UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA (LAS VEGAS)

IN RE:	Case No. 23-10423-mkn
	Chapter 11
CASH CLOUD, INC.,	
	300 Las Vegas Blvd. South
	Las Vegas, NV 89101
Debtor.	
	Thursday, August 17, 2023
	10:01 a.m.

TRANSCRIPT OF APPLICATION FOR ADMINISTRATION CLAIM ENIGMA SECURITIES LIMITED'S APPLICATION FOR ALLOWANCE AND PAYMENT OF ADMINISTRATIVE EXPENSE CLAIM PURSUANT TO 11 U.S.C. 361, 362, 363, 365, 503, 507, AND BANKRUPTCY RULES 3012 AND 8002 WITH CERTIFICATE OF SERVICE FILED BY BART K. LARSEN ON BEHALF OF ENIGMA SECURITIES LIMITED [873];
FINAL APPROVAL HEARING RE: DEBTOR'S DISCLOSURE STATEMENT FOR CHAPTER 11 PLAN OF REORGANIZATION DATED MAY 8, 2023 FILED BY BRETT A. AXELROD ON BEHALF OF CASH CLOUD, INC. [529];
CONFIRMATION HEARING RE: CHAPTER 11 PLAN OF REORGANIZATION #1 DEBTOR'S CHAPTER 11 PLAN OF REORGANIZATION DATED MAY 8, 2023 FILED BY BRETT A. AXELROD ON BEHALF OF CASH CLOUD, INC. [528];
OST RE: OPPOSITION TO APPROVAL OF STIPULATION GRANTING DERIVATIVE STANDING TO THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS WITH RESPECT TO CERTAIN ACTIONS WITH CERTIFICATE OF SERVICE FILED BY DAWN M. CICA ON BEHALF OF CHRIS MCALARY [1029]
BEFORE THE HONORABLE MIKE K. NAKAGAWA
UNITED STATES BANKRUPTCY COURT JUDGE

TELEPHONIC APPEARANCES CONTINUED.

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Also Present:	ANGELA TSAI TANNER J. AMES DAN AYALA

(Proceedings commence at 10:31 a.m.)

THE COURT: We're here on various matters in the Cash Cloud Inc. case. May I have appearances for the record?

MS. AXELROD: Good morning, Your Honor. Brett Axelrod, Fox Rothschild for the debtor. Also on the line is Tanner James from Province, the debtor's financial advisor, and Dan Ayala, the debtor's independent director.

THE COURT: Okay. Thank you. Other appearances?

MR. GAYDA: Good morning, Your Honor. This is Bob Gayda of Seward & Kissel for the Official Committee of Unsecured Creditors.

THE COURT: Okay.

MS. CICA: Good morning, Your Honor. This is Dawn Cica on behalf of Christopher McAlary.

THE COURT: Okay.

MR. KINAS: Good morning, Your Honor. Robert Kinas of Snell & Wilmer, Nevada counsel for Genesis Global Hold Co., and also on the line is Michael Weinberg of Cleary Gottlieb, lead counsel for Genesis.

THE COURT: Okay, thank you.

MR. SHEA: Good morning, Your Honor. James Patrick Shea of Shea Larson, appearing as Nevada counsel for Enigma Securities. And with me as always is Andrew Kissner, lead counsel for Enigma from Morrison & Foerster.

THE COURT: Okay. Thank you.

MR. ANDERSEN: Good morning, Your Honor. Ryan Andersen of Andersen & Beede, appearing on behalf of Luis Flores.

THE COURT: Okay. Other appearances?

MS. TSAI: Good morning, Your Honor. Good morning, Your Honor. This is Angela Tsai with Stretto, debtor's claims, noticing, and validating agent. I'm appearing for the ballot summary. That's filing Docket 1077.

THE COURT: Okay. Thank you.

MR. HERNANDEZ: Good morning, Your Honor. Carlos Hernandez, appearing for the Department of Justice, Office of the United States Trustee, currently appearing for other counsel, Jared Day.

THE COURT: All right.

MR. HAGE: Good morning, Your Honor. Paul Hage, Taft Stettinius and Hollister, appearing on behalf of Cole Kepro International, LLC.

THE COURT: Okay. Other appearances in the Cash Cloud matter?

MR. WORKS: Good morning, Your Honor. This is Ryan Works, Nevada counsel for the Official Committee of Unsecured Creditors.

THE COURT: Okay. Thank you. Any other appearances in the Cash Cloud matter? All right. There appear to be none.

All right, Counsel, there was a -- an agenda that was

filed yesterday afternoon regarding the various matters on the calendar, at least as they existed at that time. There are, I believe, 11 matters on the agenda, or I guess 11 matters originally on the agenda. The first seven of those matters have been continued. I believe those are all going to August 29th.

The Item 8 on the agenda is the application with respect to Enigma Securities represented by Mr. Kissner and Mr. Shea, which I understand is a status hearing only. I believe by prior order of the Court, there is a continued status in the matter that's scheduled also for August 29th. That appears as Item 1 on the public calendar. Item 9 on the agenda is the, I guess a hearing on the opposition to approval of the stipulation granting derivative standing to the official creditors committee. And that also appears as Item 4 on the public calendar. Item 10 on the agenda is the debtor's final disclosure statement approval, which is also Item 2 on the public calendar. Item 11 on the agenda is the confirmation hearing with respect to the proposed plan, which is Item 3 on the public calendar. All right. So I believe that's what we have left. There are three items.

Ms. Axelrod, is that your understanding as well?

MS. AXELROD: Brett Axelrod. Yes, Your Honor. That is my understanding as well.

THE COURT: Okay. So is it your suggestion that we

proceed in the order that's remaining on the agenda which would -- where we would start with the derivative standing argument and the objection raised by the McAlary -- Mr. McClary, then proceed to disclosure statement approval, then plan confirmation? Is that the suggested order?

MS. AXELROD: Brett Axelrod. Yes, that is the suggested order, Your Honor.

THE COURT: Okay. Does anyone, any counsel of record, have any objection to proceeding in that fashion?

MS. CICA: Yes, Your Honor. This is Dawn Cica. May I be heard on that?

THE COURT: All right, you may.

MS. CICA: Your Honor, this is Dawn Cica for the record. Our objection to the derivative standing and our objection to the plan has some fairly detailed financial components. I do not really want to make that argument twice. I really want to make that argument fulsomely for the record to the objection to the plan. So I would really appreciate trailing the objection -- the opposition to standing stipulation --

THE COURT: All right.

MS. CICA: -- after the plan objection.

THE COURT: Okay. MS. Axelrod, any objection to that?

MS. AXELROD: Brett Axelrod. No objection, Your

Honor.

THE COURT: Okay. Then let's -- did anyone else have any objection to proceeding in that fashion instead? Make hearing --

MR. GAYDA: Your Honor, this is Bob Gayda from Seward & Kissel for the Committee. May I be heard, Your Honor?

THE COURT: You may.

MR. GAYDA: Your Honor, I'm just -- I'm a bit confused. You know, the standing motion is -- it was a stipulation between the debtors and the Committee. Really, the legal issues at the heart of the standing motion are whether the claims alleged by the Committee, which are laid out in full in our response, which is at Docket Number 1073, and then the proposed complaint, which is attached to that document --

THE COURT: Right.

MR. GAYDA: -- are colorable and there's a few other legal issues that we have to sort through. I'm not quite sure how financial issues have any relevance to that motion. So, Your Honor, we would prefer to lead with that rather than, you know, mix the record between the standing motion which is a discreet issue and the confirmation issue.

THE COURT: Okay. Ms. Cica, response?

MS. CICA: Thank you, Your Honor. Dawn Cica for the record. I disagree. I believe the Committee did not articulate the correct standard for the Court's approval of a

stipulation for standing and the correct standard calls into question the issues with respect to whether the estate is administratively insolvent and whether giving the claims to the Committee is in the best interest of the estate.

THE COURT: I see. So let me ask you this. Is there any question, at this point, whether at this point in time the estate is administratively insolvent? Mr. Gayda?

MR. GAYDA: Your Honor, I think the record would show and we'll get to that at confirmation. Well, let me take one step back, Your Honor. And again, for the record, Bob Gayda, Seward & Kissel.

So Ms. Cica, I believe, again misstates what the standard is. The standard is this three prerequisites for committee standing, right? A colorable claim must exist. The --

THE COURT: No, no, no. Mr. Gayda. Mr. Gayda, let's be clear. I think I understand what the -- those issues are. I think you've cited the correct cases, although I can't figure out why no one had cited Judge Du's decision in the X-Treme Bullets case. But notwithstanding that, I think everyone knows the standard of the Ninth Circuit. So if we can just orderly present this in some fashion, I don't care whether or not the -- that particular issue goes at the end or at the beginning. That frankly doesn't matter to the Court. So if to save some time, we put that in the end, and you don't have any objection

as long as the correct standard is applied, Mr. Gayda, do you have any objection to simply allowing Ms. Cica to proceed at the end of this hearing?

MR. GAYDA: Understood, Your Honor. Again, Bob Gayda for the record. I don't believe, and Your Honor has made it clear that you're aware of the standard with -- and I have no doubt that you would be aware of the standard with respect to the showing that's required to give the Committee standing. I don't believe administrative solvency has any relevance to that standard. But hearing Your Honor, if you'd like to take that last, then the Committee's more than happy to do it in that order.

THE COURT: Okay. All right. That's how we'll proceed. We will undertake the, I guess it's the, I guess we'll go essentially in the order of the public calendar. We'll address the derivative standing issue at the end of this hearing. Then that gets us to Item 2 on the public calendar which was approval of the disclosure statement.

Ms. Axelrod, I didn't see any objection to approval of the disclosure statement on a final basis. Did I overlook something?

MS. AXELROD: Brett Axelrod. No, Your Honor, there has been no formal objection to final approval of the disclosure statement.

THE COURT: I see. Okay. And as I recall, the final

approval of the disclosure statement was scheduled for today because there was a prior order of the Court that granted conditional approval and set forth the procedures for plan confirmation. Isn't that correct?

MS. AXELROD: Brett Axelrod. That is correct, Your Honor.

THE COURT: Okay. So then this is actually a question of final approval of the disclosure statement. So the only issue before the Court for which there are no current objections is whether or not that disclosure statement that was filed quite some time ago still meets the standards of the -- under 1125(a) as providing adequate information. Isn't that correct?

MS. AXELROD: Brett Axelrod. That is correct, Your Honor.

THE COURT: Okay. All right. Well, the Court has reviewed the proposed disclosure statement that was conditionally approved. Having weighed the representations made, the contents of the disclosure statement, and having considered the record, the Court concludes that the disclosure statement does provide adequate information within the meaning of Section 1125(a) and therefore will grant final approval so that the parties may pursue confirmation. I'll direct you to prepare the -- and submit the appropriate order, giving final approval to the disclosure statement.

Does any counsel appearing of record wish to sign off on that order? All right. To the extent that that may be included in any order with respect to plan confirmation well -- as well, then the approval of that order will take place.

That gets us to the third matter on the public calendar, which is the confirmation hearing with respect to the proposed plan. There were a number of matters filed in connection with this in addition to the plan itself. There was, I believe, Ms. Axelrod, you filed a -- there was a memorandum of law that you filed in connection with approval of the plan, which contains certain information. There was a proposed disclosure statement/plan confirmation order, which was filed on August 16 as Docket Number 1080. There was also a revised creditor trust agreement filed on August 16 as Docket, I think, 1081. And again, the original disclosure statement that had conditional approval and now final approval, was filed as Docket Number 529. So that's the record I have before the Court.

There is also the declaration of Ms. Tsai regarding the ballots that were cast in connection with the plan. As I understand it from reading that declaration, we have ballots cast within the claim categories or classes that are impaired and entitled to vote. And as I also understand, as a result of all the ballots, we do not have class acceptance by either Class 2(c), Enigma Securities, or Class 3(a), the AVT claim.

And then there's the separate issue with respect to the, what are called the old equity in Class 4. Do I understand that correctly, Ms. Axelrod?

MS. AXELROD: Brett Axelrod. Yes, you do, Your Honor.

THE COURT: Okay. And then in connection with, I guess, the various objecting creditors, Mr. McAlary has objected as indicated by the record. You had objections to confirmation that were filed by Brinks, by Enigma. You had objections that were filed by Cole Kepro as well as arguably AVT, but you attempted to address those objections in the proposed form of plan confirmation order. Is that correct?

MS. AXELROD: Brett Axelrod. That is correct.

THE COURT: All right. So I think I have an understanding of what's before the Court now. Have you, in fact, reached accommodations with the other parties in line with the suggested revisions to the plan confirmation order?

MS. AXELROD: Brett Axelrod. I do believe that we have resolved Enigma's reservation when we filed the amended plan. I believe we have fully resolved Cole Kepro's objection by the agreed-upon language contained in the proposed confirmation order. I have not heard from Ms. Cica if the same proposed offset language is acceptable to Mr. McAlary, so that is an issue that will have to be discussed as part of this hearing, Your Honor.

THE COURT: I see. Okay. Let me hear from counsel for Enigma, Mr. Kissner.

MR. KISSNER: Apologies, Your Honor. I suppose I was on mute. This is Andrew Kissner of Morrison Foerster on behalf of Enigma.

THE COURT: All right.

MR. KISSNER: So we have no further comments on the plan or confirmation order.

THE COURT: Okay. All right. And then let's hear from Mr. Hage on behalf of Cole Kepro.

MR. HAGE: Good morning, Your Honor. Again, Paul Hage on behalf of Cole Kepro, and agree with the representations made by debtor's counsel based on language that has been incorporated into the confirmation order that was filed. We can deem the Cole Kepro limited objection as being resolved.

THE COURT: I see. Okay. Do we have anyone appearing on behalf of AVT Nevada?

MR. MERTZ: Yes, Your Honor. Justin Mertz of Michael, Best & Friedrich, on behalf of AVT.

THE COURT: Okay.

MR. MERTZ: My apologies for not making my appearances at the beginning of the hearing.

THE COURT: All right.

MR. MERTZ: The statements on the record by Ms.

Axelrod are correct. The proposed language and reservation of rights in the confirmation order does resolve any objection that AVT has to the plan.

THE COURT: Okay. Thank you. All right. Do we have an appearance --

MR. MERTZ: Thank you.

THE COURT: You're welcome. Do we have an appearance on behalf of Brinks?

MS. FALABELLA: Yes, Your Honor. Brittany Falabella for Brinks. I also apologize for failing to make an appearance at the beginning of the hearing.

THE COURT: All right.

MS. FALABELLA: Your Honor, my order approving a proc hac application was entered at Docket Number 976.

THE COURT: Okay.

MS. FALABELLA: It appears, based on the revised plan that has been filed and the funding of the confirmation fund to include the escrow account, that Brinks' plan objection has been resolved and Brinks otherwise supports the plan and is --

THE COURT: Okay.

MS. FALABELLA: -- creating a creditor account.

THE COURT: All right. Thank you. All right. And then Mr. Gayda, the creditors committee obviously or I guess not so obviously, they support confirmation of the plan, including the revisions set forth in the revised order, in the

proposed confirmation order? Is that correct?

MR. GARCIA: Yes, Your Honor. Bob Gayda for the Official Committee of Unsecured Creditors. The Committee fully supports the plan in all respects, Your Honor.

THE COURT: Okay. All right. Then, I guess that gets us to Ms. Cica on behalf of Mr. McAlary. You had an objection to plan confirmation that entails, to a degree, the objections to the derivative standing request as well. So, here's your chance. You say that they're intertwined. Go ahead and explain your argument.

MS. CICA: Thank you, Your Honor. To begin, I do agree that the language that Ms. Axelrod proposed for Cole Kepro also does work for Mr. McAlary with respect to setoffs.

THE COURT: Okay.

MS. CICA: Your Honor, my client says at the outset of our papers, as the CEO of the -- then CEO of the company, he signed the first plan. He tendered his ballot accepting the plan, but the debtor amended the plan. And at this point, because the plan has no effective date and because the plan cannot be confirmed, it's not feasible, and it cannot be implemented.

In the first place, nobody disputes, I don't think, that the debtor doesn't know how much cash they have today, but at the most, it appears to be about 2.2 million. Nobody disputes that the debtor can't tell you how long it will take

to get the money they need to confirm the plan. The reason the debtor can't tell you how much it will cost to go effective is because the cost of going effective is a function of how long it will take to complete the litigation upon which the plan depends, which the debtor also doesn't know.

So it's kind of like the movie, *My Cousin Vinny*, show me the money. If what the debtor is saying is we need a bunch of money to go effective, then I guess the simple answer is, come back when you have the money. Why is the Court being asked to confirm a plan now? This is a liquidating plan that provides for a liquidating trustee, but instead the debtor is asking this Court to confirm it now so that instead of the liquidating trustee taking on all of this litigation, apparently the Committee is going to take it on. And the debtor tells you this is okay by giving you a -- several negotiated orders from mega cases in Delaware and New York that the debtor cites to, Your Honor, on Paragraph 155 of this memorandum which is at Docket 1078.

If you -- if I could ask the Court to look at the liquidation analysis filed by the debtor at Docket 1079, Page 6 of 8. First, how much cash does the debtor have now? Although it's not entirely clear and there are no MORs, I, the last one I could find is for April, and we're in August. It's not entirely clear. It looks to me that the debtor's cash on hand today is encompassed by the first two bullet points under asset

recovery sources which is cash and bank accounts and cash in transit, the 702,000 and the 40,000. There's also money in the kiosks which the debtors had several months to get out, but nevertheless, the debtor estimates there's still somewhere between 950,000 and a million-four. Assuming and giving the debtor the benefit of the doubt, that adds up to 2.2 million. Debtor generally agrees with this, according to Paragraph 147 of the memo.

If you look at the next line on the liquidation analysis, the net sale proceeds from kiosks and software, 2.4 million, that appears to be the remaining money from the 363 sale. However, in the UCC's motion for standing that was filed at Docket 925, the UCC admitted that the unfortunate reality of this case is that debtor's assets were worth less than the value of the secured debt, and the proceeds of the sale of the debtor's assets fully benefited the debtor's secured lenders.

With that in mind, if the Court can drop down to the middle of the page where it says allowed secured claims, 5.3 million, this is interesting because the debtor had a DIP loan for which it owed 5.4 million. The first 3.5 million of the 363 money presumably went to pay off a portion of the DIP. So it appears the DIP is owed the balance of approximately 1.1 million, but I don't see that reflected anywhere in this liquidation analysis or discussed anywhere by the debtor.

On top of that, (audio interference) of Genesis,

Enigma, and AVT, which I believe is the 5.2 million, which is shown in the middle under allowed secured claims, 5.280. So I believe the sale proceeds from the kiosk, the 2.4 million, is going to go to that 5.2 million. The debtor's discussion of these numbers is on Pages 43 and 44 of its memo. Transparent, these numbers certainly are not.

Everything below those numbers in that column is a result of litigation. The debtor goes through these cash enhancing projections in Paragraph 48 and projects for the Court that within the next six to nine months, the debtor will have already recovered net judgments from the litigation targets of between 8.4 to $15.5 million. That's Paragraph 149 of the debtor's memo.

The litigation is speculative. The original disclosure statement filed on May 8th at Docket 529 acknowledges this by noting in the risk factors section, quote, "However, given the large number of uncertainties at this time, including the amount of net proceeds on causes of action, which the creditor trust will ultimately recover, it is not possible for the debtor to provide any reliable estimate at this time as to the expected ultimate recovery for holders of general unsecured claims." So I submit to Your Honor that this statement is no less true now than it was then, and in fact, it is actually not possible for the debtor to provide any reliable estimate at this time as to the expected ultimate recovery from

this litigation. This is the basis of their feasibility and this is the basis of their implementation and it is entirely speculative. There is no other evidence. They have not shown anything by a preponderance of evidence.

Against that, the debtor tells the Court that there is currently $4 million in filed administrative expense claims for professional fees. That's Paragraph 150 of Docket 1078. However, if you look at the spreadsheet that was filed as Exhibit 1 to Docket 1029, it actually lists each professional monthly statement filed, gives you the date and the docket number, and it estimates the committee counsel fee for June, which was now filed, and the estimate was actually less than the actual filed amount. The number is around 4.6 million. So right off the bat, they're a half a million dollars underneath what was actually filed. So hopefully that gives Your Honor some pause as to the veracity of the rest of the debtor's numbers as we go through this.

As we describe in our briefs, this is just the statements for four of the five professionals that are all going to be billing prior to the effective date. And this is just from the end of February through June. So four months, four months, 4.6 million, not including FTI, which is the Committee's FA and which has not filed any statements. A reasonable assumption, just for working through this discussion, is that they're likely half of what Province has

been billing. So let's say another 200,000 a month. So another 800,000 to equalize them with everybody else who files through June. That's another 800,000. So through June, the five sets of professionals are at approximately 5.3 million, and you're way over a million dollars a month.

Now add July. That's another million. That's 6.3 million. We're halfway through August, another half million. That's almost 7 million approved to date and the debtor tells you it's 4 million. So the debtors are off by quite a lot.

So these five types of professionals are billing an average of a million dollars a month without any of the litigation going on. This is with no litigation going on and it's going to be more when the litigation starts. The debtor tells you that they think it's going to be $4 million and it's only going to take six to nine months to get all of these recoveries. But as I read to you, the debtor, itself, told you in its disclosure statement that it cannot tell you how long it's going to take or how much it's going to recover. And really, whoever heard of this kind of litigation for these kinds of dollars being complete to judgment and collection in nine months?

But that's, but there's one more element. That's the cost going forward, which they haven't calculated at all as part of this. It's -- if it's six to nine months, that's another 6- to $9 million on top of the almost $7 million that

is accrued to date. And for each month that it takes longer than that, it's another million dollars. Against that, they say, well, it would be a terrible idea to get a Chapter 7 trustee because it's going to be $3 million for them to do all of this. Well, that's starting to sound like a really good idea.

Your Honor, with that as a backdrop, let's look at the objection and the law. The debtor has the burden of proof. They have to prove it by a preponderance of evidence. As you know, you have to independently assess it. The debtor has not proved by a preponderance of evidence how long it will take for the effective date to occur. It cannot tell the Court how much money it will need for the effective date to occur, and its estimates are not even close. The longer it will take, the more money it will need, and the less chance there is, realistically or possibly, that an effective date will occur.

That means the plan doesn't meet 1123(a)(5) because there's not adequate means for implementation because you can't determine when the effective date is. The term, effective date, is not defined in the Bankruptcy Code. The debtor did not refute any of the case law, which we set forth in our brief at Pages 13 and 14. Our brief is Docket 1061.

The In re Potomac Iron case says the effective date should be set forth in the amended plan with specificity. In other words, if your plan doesn't specify when the effective

date is, the plan doesn't provide for adequate means of implementation.

But more importantly, the debtor cannot prove by a preponderance of evidence that the plan can be implemented such that an effective date can ever occur. This is related to feasibility. The debtor cannot prove that the plan is feasible. 1129(a)(11) provides that the plan is not likely to be followed by litigation of the debtor. We cited case law, actual case law, not, you know, mega negotiated opinions, but actual case law that states a plan is not feasible if it hinges on future litigation that is uncertain and speculative because success in such cases is only possible, not reasonably likely. In re Biz as Usual, 629 DR 122 at 130.

The Court must make a specific finding that the plan as proposed is feasible. The debtor's brief cites the case in this district from Judge Markell that's also instructive on this point, In re Trans Max Technology, 349 B.R. 80, which it -- that was the case about exit financing. Judge Markell says that 1129 requires the plan's proponent to show concrete evidence of a sufficient cash flow to fund and maintain both its operations and obligations under the plan. 349 B.R. at 92. Judge Markell goes on, "In assessing the evidence adduced for the feasibility requirement, '[t]he Code does not require the debtor to prove that success is inevitable,. . .and a relatively low threshold of proof will satisfy 1129(a)(11),'"

he says. "But the court must still have a reasonable and credible basis for making the findings necessary under Section 1129(a)(11)." That's 349 B.R. at 92. Contrast that with the debtor's attempt to deflect concerns about feasibility by citing to the confirmation orders by the mega cases. And there is no other case other than the one we cited saying that you can't use speculative litigation. And the debtor admitted that it's speculative and its risk factors and its disclosure statement.

I'm paraphrasing, but this is important. Judge Markell notes too often feasibility determinations can be compromised by an unhealthy alliance of professionals who want their fees and creditors who want to postpone reporting the inevitable. He goes on to say at Page 93, the real problem lies not in the Court, "but in the conference rooms across the country where the debtors and creditors create and agree to" these plans. "In those conference rooms, a bankruptcy judge has no control or influence, and the parties themselves may bind each other to dubious...plans."

That's essentially what the debtor is telling you, Your Honor. Don't worry about the actual provisions of the Bankruptcy Code with respect to this plan. They don't need to re-solicit. The disclosure statement doesn't need to be generally correct. Genesis has the biggest claim and they've agreed. But this Court has an independent duty to determine

whether this complies with the Code and we don't think it does because the feasibility is based on recovery from litigation. That's speculative. Litigation by nature is speculative. It's expensive. It's complex. Recovery is uncertain. It's time consuming, and in this case, five sets of professionals are charging about a million dollars a month and they're already around $5 million underwater according to the liquidation analysis. A Chapter 7 trustee would only be 3 million.

Another point, Your Honor, that was made in our papers that was not refuted by the debtor, is that the plan doesn't comply with 1129(a)(5)(A), which requires that the proponent of the plan disclose the identity and affiliations of any individual proposed to serve after confirmation of the amended plan as a successor to the debtor under the plan. And, and Your Honor, that the appointment to such office of such individual is consistent with the interests of creditors and equity security holders and with public policy.

Here, the new plan calls for two creditor trusts. The debtor has not disclosed, meaning their affiliations of either creditor trustee, nor has the debtor disposed the makeup of any oversight committee. Another liquidating trust agreement was filed yesterday, and again, no name was included.

In the debtor's brief, the debtor repeats this point merely by saying, well, you know, the debtor's officers and directors aren't going to be going forward, post-confirmation,

so we don't have to disclose anything. But that's not true. The liquidating trustee is a successor to the debtor. And so it's -- he still has -- he or she still has to be disclosed, and the tests still have to be met. The lack of those disclosures makes it impossible for this Court and interested creditors to evaluate whether the proposed transfer of litigation, including the Cole Kepro litigation, is consistent with the interest of public policy and creditors.

Mr. McAlary's papers disclosed the issues related to the debtor's agreement to sell the litigation including the Cole Kepro litigation to Mr. McAlary, only for the debtor to then refuse to consummate the sale after objection from the Committee, shared by Cole Kepro. The debtor's plan proposes to transfer the claims objection process to the liquidation trust, including the right to object to the two proofs of claims Cole Kepro filed, which total approximately $59 million. All of the concerns about ensuring the valuable Cole Kepro litigation in the claims objection process will be resolved if this case is converted and the conversion motion is set to be heard on regular notice September 13th.

But again, the failure to identify the liquidating trust makes it impossible for this Court to confirm the plan because the identity and affiliations of those individuals proposed to serve after confirmation haven't been disclosed. And Cole Kepro has not disclosed to this Court conflicts of

interest which are not consistent with the interests of predators and equity security holders and public policy.

The brief also made the argument that the amended plan does not comply with 1129(a)(9) and this also is not refuted by the debtor. The debtor makes the point that they don't have to pay administrative expenses on the confirmation date. And we agree with the debtor, but they do have to pay them on the effective date. And it's not enough to say, well, we just won't have the effective date until we have enough to pay them because you get back to the implementation and the feasibility problem. So because they can't ever show that they will have enough money to pay administrative claims on the effective date, this plan -- they cannot comply with 1129(a)(9).

Finally, Your Honor, I would like to make an oral objection to Mr. Tanner's declaration that was filed two days ago. I don't believe our stipulation to the debtor stipulated that the debtor could include additional evidence. But in addition, I would like to make an oral motion to strike Paragraphs 5, 7, 8, 10, 11, 12, 13, 15, 16, and 17 as containing inadmissible hearsay. With that, I'll answer any questions Your Honor has.

THE COURT: Okay. Thank you. All right. Ms. Cica, I assume you meant to refer to the *Jerry McGuire* movie instead of *My Cousin Vinny*, as far as show me the money.

MS. CICA: You're right. I did. I apologize.

THE COURT: Okay. Fair enough. All right. I think I understand the position that you've outlined, which appears in the written objection to --that was filed as well. And Ms. Cica, I take it this, the presentation just now, also encapsulates the argument you're making in connection with the appointment of the Committee as the representative on the claims. Is that right? The derivative standing argument?

MS. CICA: Yes. When I make that argument, Your Honor, I would like to incorporate by reference all of this argument that relates to the financials and the dollars and cents and where the debtor is with respect to its administrative claims, now and going forward.

THE COURT: I see. Okay. All right. Ms. Axelrod?

MS. AXELROD: Thank you, Your Honor. Brett Axelrod for the record.

Yes. So we have our only remaining objection to confirmation is Mr. McAlary, who is debtor's former CEO and target of a fraudulent transfer, breach of fiduciary duty claim, with asserted damages of over $25 million. We have Mr. McClary, you know, his objection is flowing in the face of express support of 95 percent of the creditors voting who are actually in the money, unlike equity who is receiving nothing, you know, under this plan. We believe that we have satisfied the feasibility test as well as the best interest test. And

let me address, in turn, what was, you know, raised regarding the alleged insufficiency of the evidence.

Let's first take a look about what has to be provided for administrative expense claims. They either have to be paid in full or they can agree to some other treatment. Your Honor, we have set forth a detailed analysis in Mr. James' declaration as well as in the confirmation brief on what are the likely sources of recovery and what the debtor projects is the reasonable likelihood to bring those assets in to fill the administrative, you know, hole. And that evidence includes that the debtor currently has approximately $702,204 in available cash and bank accounts. It has roughly 40,000 of cash in transit, and then between 952,000 to approximately 1.4 million of cash in its kiosks. On top of that as other sources of recovery and for feasibility, what's pending for the Court and discovery has already commenced is the surcharge motion to the secured creditors, which the debtor believes is going to result in additional recovery because the reality of the auction is that it was for the benefit of these secured creditors.

There is also potential recovery of fraudulent transfers to Mr. McAlary as well as ongoing litigation. And we set forth a range, Your Honor, because I agree, you -- litigation, you know, is not definitive and that's why we wanted to give to the Court and to creditors who are supportive

of the plan, what is that likelihood.

We also have recoveries and offsets of avoidance actions and that is part of the reason for the stipulation that will be coming up, Your Honor, with derivative standing, is to actually reduce administrative costs. I know Ms. Cica is wanting to look at the historical run rate, which was stabilizing operations and conducting a fulsome sale as a prediction of the future, but you can't use when you're stabilizing operations in a sale versus the go forward work is literally the collection of assets, resolving administrative claims to decrease the denominator, and from these assets. The debtor is already in, yeah, with consultation with the Committee and various settlement discussions of some of these litigation assets, and that's why we put in the six-to-nine-month time frame at 1.85 to $3.85 million recovery is based in part on those conversations.

We have already submitted claims and so has Mr. McAlary, on indemnification for the D and O policies. We also are in still negotiations for sale of remnant assets, seeking the employee retention credits under the pandemic funds, also collecting on unused post-petition retainers and the -- those are already, you know, in the works. So we believe that we have met our -- the burden when it comes to feasibility.

I know that Ms. Cica is focused on that we must, you

know, have, you know, a plan that can show feasibility, you know, day one with -- regarding with the effective date payments. We have cited to numerous authorities that would allow us, Your Honor, to confirm this plan and check back in the Court for the plan to go effective based on all of the items I just listed, and which are contained in the brief to collect, to give this Court a status. And there is nothing that prohibits, to the extent there is a shortfall, that administrative creditors can choose to roll into the creditor tranche to assist with this plan going effective.

We are seeking cramdown, Your Honor, of the creditors that voted to reject the plan, and I set that forth in the brief. I don't know if Your Honor wants me to go through those standards or has any questions regarding the cramdown.

THE COURT: I don't believe the Court has any questions about the attempt to cramdown with respect to the non-accepting impaired creditors. I believe that your draft order includes findings with respect to how the cramdown analysis would apply as far as a fair and equitable treatment of the creditors, so I think I understand your position. Was there anything else you want to say about that?

MS. AXELROD: No, Your Honor. I will rest on the pleadings in front of the Court and my oral argument.

THE COURT: Okay. And I guess, Ms. Axelrod, I think Ms. Cica spent some time talking about the Trans Max case that

Judge Markell decided years ago. But my, if I recall Trans Max correctly, wasn't that a debtor that was trying to obtain financing to produce a flying car? Isn't that what that case was about?

MS. AXELROD: Brett Axelrod. Yes, that was -- the case was about -- that was very different from what we're talking about here, which is just the collections of assets and the modification of, you know, assets. This is not contingent on financing, even though that may be a path forward when it comes to litigation financing and contingency fee attorneys, to maximize the asset recovery, Your Honor. But I think it can be easily distinguished. This is a debtor that is going to end up dissolving upon the effective date.

THE COURT: Okay. All right. Let me hear from -- let's see. Let's go to Mr. Gayda on behalf of the Creditors Committee.

MR. GARCIA: Yes, thank you, Your Honor. Bob Gayda, Seward & Kissel for the Unsecured Creditors Committee. So one point at the outset, Your Honor. Ms. Cica refers to 1129(a)(5) and the requirement that a -- and suggests that the liquidating trustee needs to be identified ahead of, or at confirmation. That's incorrect, Your Honor. 1129(a)(5) deals with a director, and this is a quote, "a director, officer, or voting trustee of the debtor" would need to be identified.

We, again, are not going to have a reorganized debtor

in this case. So 1129(a)(5), which is applicable to and requires that the identity and affiliations of individuals be disclosed and that their appointment is consistent with the interest of creditors, doesn't apply. Ms. Cica cites to no authority that 1129(a)(5) applies to the trustee of a liquidating trust, and liquidating plans are routinely confirmed prior to the identification of the trustee.

THE COURT: Okay.

MR. GARCIA: Out -- outside of that, Your Honor, I think from a big picture perspective, Mr. McAlary is the sole objector here. Mr. McAlary, as you've seen in the Committee's response to his opposition to committee standing, is the target of a myriad of litigation claims. Mr. McAlary is now, you know, making the argument that since the debtor's unable to pay administrative expenses, the estate today, that the debtor can't confirm the plan.

The Committee, Your Honor, finds this position offensive. It is Mr. McAlary, based on our investigation, that is largely responsible for the debtor's current financial condition and leaving $150 million in unpaid, unsecured claims on this estate. Yet Mr. McAlary now attempts to leverage the debtor's woeful financial condition to his benefit, by impeding the plan process and which process includes bringing claims against Mr. McAlary to remedy his inequitable conduct. So the Committee implores the Court to see through his façade.

With respect to the plan, the debtor and the Committee have worked together to craft this structure that allows the debtor to exit bankruptcy on the most efficient basis possible. Yes, admittedly, there's work to do before the plan can go effective, but the debtor and the Committee are prepared to do that, and all of the pieces are currently in place for that to happen in the near term. For example, Your Honor, the estate has an agreement in principle with Cole Kepro to resolve the Cole Kepro claims, which would see $850,000 come into the estate. And notably, Your Honor, that's more than Mr. McAlary, who's bidding for the Cole Kepro, Bitaccess, and Bitcoin Depot litigations combined. The estate's reached out and commenced settlement discussions with Bitaccess and Bitcoin Depot.

The Committee is fully prepared, as evidenced by our proposed complaint, Your Honor, to prosecute claims against Mr. McAlary tomorrow, if Your Honor would grant us standing. The estate is weeks into an analysis of the employee retention credits, which Ms. Axelrod alluded to. The surcharge motion is teed up as is the Committee challenge to Enigma claims. The debtors and the Committee have done the work to evaluate preferences that might be pursued, and the estate is still seeking information regarding Brazil, speaking with parties that might be interested in purchasing that entity. And we're also talking to parties to monetize the debtor's licenses.

So while the estate doesn't have liquidity today to satisfy administrative expenses, it has a concrete, methodical, and actionable plan to get there, and that plan is being implemented as we speak. This is not a pie in the sky theory. It's not a speculative hope, but it's action that's ongoing on numerous fronts to monetize estate assets and pay all administrative creditors and hopefully to source a recovery for unsecureds.

Ms. Axelrod also alluded to this, Your Honor, but the most notable thing to me is that this structure, which the debtors and the Committee propose, is the preferred structure of an overwhelming number of the debtor's creditors. That's 189 out of 195 unsecured creditors. Those creditors that are the residual stakeholders in this case, voted in favor of the plan. Those creditors think it's the best path to resolving this case, given all of the work that's been done to date. Those creditors' perspective on how to approach the situation, like and admittedly, not where anyone wants to be, but it's what we have to deal with, that perspective should be given substantial weight. It most certainly should be given far more weight than the opinion of Mr. McAlary, who's acted in his own self-interest for years and continues to do that today. This is the insider that created the problem. That very insider should not benefit from the problem himself in his quest to duck liability for his claims.

So, Your Honor, we believe that the debtor has shown by a preponderance of the evidence, and again, that's the only evidence in the record, that this plan is the best option for creditors. That there is a reasonable basis to believe that administrative claims would be satisfied in the near term, and that this plan can go effective. No other evidence has been induced to the contrary, irrespective of Ms. Cica's testimony in her argument today. So that's the Committee perspective on the plan. Based on all of that, Your Honor, the Committee respectfully requests the Court approves the plan as proposed.

THE COURT: Okay. Thank you. And Mr. Gayda, as I understand it, with the Committee's support, there was the prior stipulation with respect to Enigma that there would be a continuance of the Committee's motion for standing. That particular proceeding -- motion would be continued to, I think August 29th. Is -- isn't that correct?

MR. GARCIA: I believe that's correct, Your Honor.

THE COURT: Okay. So the standing question there is, I guess, a notion of derivative -- of standing of the Committee to proceed to include claims that might encompass Enigma. Is that fair to say?

MR. GARCIA: Yes, Your Honor. As Your Honor is probably aware, there were several stipulations filed on the docket with respect to committee standing. And this is part of a bigger picture.

I mentioned the debtor and the Committee working together to formulate a plan, right? The debtor has taken on certain elements with respect to negotiating administrative expense claims and certain preferences. And the idea being that the Committee, while we're trying to monetize assets, seeking to continue litigation, would step into the shoes of the debtors with respect to certain issues. One of those issues would be the Enigma lien challenge. I, as Your Honor is correct. That's teed up for a few weeks from today.

And the other of those issues would be the McAlary claims. We also included in the stipulation certain preferences and also had the Bitaccess, Bitcoin Depot, and Cole Kepro litigations subject to a separate stipulation which Your Honor denied.

THE COURT: Okay.

MR. GAYDA: We will -- we're preparing a motion on that, so that can be heard on regular notice. But that's big picture where we sit with respect to standing and the various stipulations and motions.

THE COURT: Okay. I guess, Mr. Gayda, I apologize. What I'm getting at is that on August 29th, there's a status hearing with respect to one of the motions dealing with derivative standing of the Committee. The last matter on today's calendar, which Ms. Cica wants to provide additional argument, also addresses the issue of derivative standing. So

one would expect that the Court's ruling should be consistent with respect to both of the matters. Isn't that fair to say? Or at least the analysis should be consistent?

MR. GARCIA: Your Honor, I think obviously the same standard would apply.

THE COURT: Okay.

MR. GARCIA: But I think the Court would need to look at the different claims. Your Honor, are you suggesting continuing the --

THE COURT: No, no, no. Mr. Gayda, I'm not suggesting continuing at all. I'm just trying to recall that, that one part of the stipulation, at least the way the stipulations were filed, one of the stipulations referred to preserved claims and the other referred to actions, which entails the, I guess, the action against Mr. McAlary. That's my understanding of the way the two stipulations were drafted. But with respect to the preserved claims, that's the motion that is being continued and will be discussed in connection with the status matters on August 29th, isn't that? Did I miss something?

MR. GAYDA: No, I think Your Honor has it right, and I'll just take one step back just to make sure I'm being clear because I think I conflated the issues. So we filed a motion with respect to standing to challenge certain Enigma liens.

THE COURT: Okay.

MR. GAYDA: That motion is scheduled to be heard on August 29th.

THE COURT: Okay.

MR. GAYDA: Then that, yeah, so that's our understanding and that, Your Honor, we view as a relatively discreet issue. It relates only to Enigma.

THE COURT: Okay. All right. Thank you.

Okay. The Court has heard what it needs to hear in connection with plan confirmation. Separately, there was the last motion that -- that's on today's calendar. It deals with, as mentioned, the derivative standing objection or the objection to the proposed stipulation on derivative standing.

Ms. Cica, Mr. McAlary objected to that. You've had a chance to explain how you believe that argument dovetails to your objections to plan confirmation. Was there something separate that you want to now add in connection with your objection to the derivative standing of the Committee?

MS. CICA: There is, Your Honor. But first, I -- there was some confusion procedurally, at least from my end. I viewed the stipulation with the Committee as just a scheduling stipulation because at the time we entered into it, you hadn't ruled on the Committee's original stipulation or the order shortening time or any of that. And then you denied their stipulation and you denied my order shortening time as moot. And so I was surprised when you granted the scheduling

stipulation. And as you say, we did, you know, we didn't really give a fulsome discussion of X-Treme Bullets. We, in addition, the claims that we were aware of at the time from the Committee to which we responded both to the Committee and in our opposition, were not entirely the same claims as what they filed two days ago which was much more extensive.

And given that this was all done by stipulation and we didn't have notice of the claims that we have to apparently defend today, it would be, I think, my preference and I'm certain that Mr. Gayda will object, to continue this and actually have it on notice with briefing, as you suggested in your original denial of the stipulation. So I was hoping the Court would entertain that and put this on the August 29th calendar.

THE COURT: All right.

MR. GAYDA: Your Honor, if I may?

THE COURT: I'm sorry. Who is this?

MR. GAYDA: Your Honor, this is Bob Gayda. If I might respond?

THE COURT: Okay. Well, again, I think I tried to explain it. Let me do this again.

When the motion was filed as Docket Number 925, which was the motion of the Committee for an order granting derivative standing and authority to commence and prosecute claims on behalf of the estate, it had as a defined term, the

reference, what they called "preserve claims" including lien challenge claims, re-characterization claims, et cetera.

Then, the stipulation was filed with respect to the administrative expense claim, the standing motion, the surcharge motion. That stipulation was filed on or about, I believe, on August 4th as Docket Number 1026, and then the Court granted the order approving that stipulation and entered that, agreeing to the various dates that are set forth in the stipulation, including a status conference on the surcharge motion, Enigma administrative claim, and the standing motion, all of which would be heard on August 29th.

Then, there was the follow up stipulation that was filed and that concerns the -- what was defined in the stipulation as being quote, "actions," or excluded the actions or including the potential McAlary litigation together with a profession -- preference actions defined as quote, "actions." And the Court granted the stipulation, allowing the objection to be raised to that stipulation and that's what's before the Court today. So if the Court confused it, I apologize, but that's the source of the confusion.

So, Mr. Gayda, do you object to this matter being continued to August 29th?

MR. GAYDA: Yes, we do, Your Honor. And Ms. Cica is exactly right on that element.

Your Honor, we filed a stipulation. Mr. McAlary

opposed that stipulation. The parties discussed what would be an appropriate timeline to bring that issue before Your Honor. The parties agreed on that timeline, which would be that the Committee filed a response by the 15th, and the issue would be heard today.

THE COURT: Okay.

MR. GAYDA: We believe that that's the way this should proceed. Your Honor, you know, as evidenced by a lot of the testimony of Mr. James, the discussion on the record, the estate needs to move forward with litigation. It needs to move forward with litigation now. And we believe that this is a, if not the biggest, it's a significant piece of litigation that should move forward. The Committee is prepared to immediately bring a complaint based, if Your Honor would grant standing. And we don't think that there should be a 12-day adjournment of that issue.

Mr. McAlary obviously is doing everything that Mr. McAlary can to delay the Court from seeing these issues, from hearing these issues, and from making decisions on these issues. That's why Mr. McAlary has opposed our standing motion and Mr. McAlary's filed a motion to convert this case to Chapter 7. Mr. McAlary views that as an opportunity to displace the Committee and get a trustee in place and delay those actions being brought by a number of months. It -- it's fairly transparent, and we think that it should go forward

today, Your Honor.

THE COURT: Okay. Thank you.

All right. Ms. Cica, the Court agrees that the matter should go forward today. I've heard from you with respect to the request for continuance, but you did file the objection with respect to derivative standing. I've reviewed the document. Was there anything else that you wanted to argue in addition to incorporating your arguments in connection with plan confirmation?

MS. CICA: Yes, sir. Throughout this case, Your Honor, you've been hearing from the other party, but I would actually like to briefly introduce you to my client. He started this company which allows people to buy and sell cryptocurrency through these kiosks in 2014, when he was in his twenties. He started it on his own, built it on his own, from free cash flow, for almost (indiscernible) years, a third of his life. He held 100 percent privately as a subchapter S corporation, and in 2020, the company made over $14 million in net profit as the company began its exponential growth, primarily funded with unsecured loan commitment from Genesis.

Then, through no fault of his own, Cole Kepro sold the company thousands of kiosks that Cole Kepro had been told by the screen manufacturer prior to shipping, had defective screens, thousands of kiosks. The company began to struggle with kiosks in the field whose screens would go black.

Following that, Bitaccess, the company's software provider, was purchased by Bitcoin, the largest software provider in the (indiscernible) industry. Apparently, Bitcoin had heard Cash Cloud was in the process of developing its own kiosk software, and they were afraid of the competition. So Bitaccess, now owned by Bitcoin, in direct and obvious violation of their clear and unambiguous contract, turned off the software so the kiosks wouldn't work. That then caused the company to install its own software in the kiosks. Then, that software was hacked.

So all of that was going on. There was a huge shakeup in the value of cryptocurrency as a whole, and the company's biggest financier, Genesis, themselves filed bankruptcy and was unable to fund the remainder of the funds they had committed to the company. And that's why the company filed bankruptcy, not because management was bad, not because operations were bad, not because sales were bad, not because my client breached any fiduciary duties, but because of the perfect storm of the damage from Cole Kepro, Bitcoin, and Bitaccess. And that's what the disclosure statement says, and that's what the first day declarations say. And that's what Cole Kepro even says in the pleadings in the state court.

Then what did my client do? He hired investment banks and financial advisors and lawyers to try and find other sources of capital to try and restructure the company and

replace the Genesis commitments. When bankruptcy looked like the only alternative, he hired the best lawyers, Fox Rothschild. He hired the best financial advisor, Province. Upon their retention, he immediately acquiesced to an independent director and relied day-to-day on advice from Fox and Province. They, in essence, developed a restructuring strategy to steer the company in reorganization. Each and every material decision taken that followed the retention of Fox and Province was done either at their behest, upon their advice or through -- with their review and consent. By law in Nevada, those actions are protected by the business judgment rule. See Wynn Resorts v. The Eighth Judicial District Court, 130 Nev. 369, 377 (Nev. 2017).

And what happened? This case was a disaster, a complete and total disaster. Almost 7 million in professional fees from February to August, million dollars a month, the fire sale of kiosks and software for 5.7 million, not even enough to pay the secured set of lenders. Two sets of lawyers for the Committee, two sets of the most expensive FAs in the country. You have to ask yourself what's happened.

Your Honor, I did file a request for judicial notice at Docket 1074, and I attached the relevant pleadings for Your Honor in the state court case against Cole Kepro. Cole Kepro keeps insisting that the state court case has been dismissed. They imply that it has been substantively dismissed. That's

not true. As Exhibit 15 of Docket 1074 states, this is an administrative closure which is the equivalent -- the state court equivalent, anyways, of a bankruptcy stay. And it notes that it's an administrative closure due to a bankruptcy.

Cole Kepro did file a motion to dismiss the case and that was denied. They filed a motion to reconsider and that was denied as well. In that case, there's evidence that when the defects were first made known to the company, Cole Kepro's CFO admitted to the defects. It was only when the extent of the company's damages became known did all of the disputes arise. In any case, they apparently soon realized that the very existence of their company was on the line.

As set forth in the opposition, the debtor had agreed to sell the Cole Kepro litigation to my client to the point where all of the documents, including the Epiq purchase agreement, the motion, the declarations, the OST documents were prepared and ready to file, and Fox had sent out emails to Counsel requesting consent before the debtor reneged. That was the same Friday that the Committee and the debtor's stipulation was filed.

The debtor then advised that they had to renege because the Committee vociferously objected. Now, we just heard today that the Committee is now selling the Cole Kepro litigation to Cole Kepro for $850,000. And the debtor indicated that was more than my client was supposed to pay for

all of it. But that's not exactly correct. My client had offered the debtor 750,000 for all three pieces of litigation, plus 10 percent of the proceeds, net only the cost, not the attorney's fees. And my client had an engagement letter from contingency counsel to Diamond McCarthy, who had agreed to take these three cases on.

The last required provision in that APA insisted on by the debtor, to which my client agreed, was that he would purchase the Cole Kepro claim even if they filed bankruptcy as they had been threatening to do. In any case, as the company was failing and the bankruptcy occurred, not only did Cole Kepro get on the Committee, but they became the co-chair. From the beginning, they caused the Committee to push the debtor for a quick liquidation rather than a measured restructuring.

My client continued to follow the advice of his advisors. The Committee said to the debtor, hey, the CFO -- the CEO can't talk to any bidders before they give us their stalking horse bid. That seemed to make no sense in a company where the CEO started the company, was the sole owner, and had all of the knowledge of the company and the industry and was virtually the largest player before the perfect storm caused by Cole Kepro and Bitaccess. But he followed the advice of his advisors.

All of the bidders had asked to speak to him during the due diligence process. And I will tell the Court that the

bidders were all perplexed as to why they couldn't speak to him regarding potential restructuring bids, especially when the CEO himself was offering to raise additional capital. Unsurprisingly, the only bids received by the debtor were fire sale bids, not going concern bids. When you don't have the access to the CEOs who built the company, why would you give a going concern bid? As events have proven, you don't. But this is all good for Cole Kepro and part of their plan to force this company into a fire sale so they could save their own company.

And so it is no surprise this Committee, led by Cole Kepro, now has their sights turned on my client in an effort to get the professional fees paid in this disaster of a case. And I apologize for the long introduction, but context is crucial with respect to the issue of committee standing to prosecute the claims against my client.

My understanding, Your Honor, is that the committee standing motion only applies to Enigma. My understanding of that is from the debtor and by my reading of that motion. My understanding is that the claims against my client, whatever they are, are governed by the stipulation that was executed by the debtor and the Committee after they -- the debtor chose to renege in its sale to my client of the Cole Kepro litigation.

In any case, the creditor's committee response correctly cites to In re Spaulding Composites, which is a pivotal case in the Ninth Circuit for committee standing.

Derivative standing stipulations were first considered in the Ninth Circuits and the Ninth Circuit noted, quote, "So long as the bankruptcy court exercises its judicial oversight and verifies that the litigation is indeed necessary and beneficial, allowing a creditor committee to represent the estate presents no undue concerns."

The case the Committee did not fight, however, is In Re X-Treme Bullets, 642 B.R. 312, which is the 2022 Nevada Federal District Court case where Judge Du was faced with an appeal of a bankruptcy court opinion where the debtor had granted standing via stipulation and the stipulation was objected to for a host of reasons, including that there was no hearing held, no notice given, no opportunity for objection. It was unclear what causes of action might be pursued by the committee. No discussion was made of colorable actions, no analysis of cost, et cetera, et cetera. Based on those complaints, the bankruptcy court at the conclusion of the argument ruled, orally stating, I'm granting your motion to dismiss.

In this appeal, Judge Du thoroughly examined the law governing derivative standing stipulations in the Ninth and Second Circuits. Judge Du stated quote, "When derivative standing stipulations were first considered, the Ninth Circuit reasoned, 'So long as the bankruptcy court exercises its judicial oversight, verifies that the litigation is indeed

necessary and beneficial, allowing a creditors committee to represent the estate presents no undue concerns,'" citing Spaulding Composites. Judge Du went on to note that the Second Circuit in In re Commodore International, 262 F.3d 96, (2nd Cir. 2001), adopted the reasoning in Spaulding Composites with respect to stipulations consenting to standing. But when the debtor consents, the Second Circuit required the Bankruptcy Court to conduct a further two-part test to find that conferring derivative standing on the committee is A, in the best interest of the bankruptcy state, and B, is necessary and beneficial to the fair and efficient resolution of the bankruptcy proceeding. In re X-Treme Bullets, at 322.

Judge Du notes that the Ninth Circuit has not expressly adopted the two- part test articulated in the Second Circuit's Commodore International. But she goes on to say, "However, the language requiring that conferring derivative standing to be necessary and beneficial to the fair and efficient resolution of the proceedings, the source of both the two-part test and the Second Circuit's analysis for revoking a stipulation is derived from Spaulding Composites." Then Judge Du holds that, quote, "Because the Ninth Circuit has not directly spoken to the question, but the Second Circuit standards are derived from the Ninth Circuit precedent, the court will adopt the Second Circuit reasoning here.: In re X-Treme Bullets at 323.

So Judge Du suggests that where the debtor advocates responsibility as to claims and consents to committee standing, a creditor will typically face a comparatively greater burden to establish derivative standing. In re X-Treme Bullets at 322. As such, this Court, pursuant to that case, should find that in order to grant this Committee standing, that it's in the best interest of the bankruptcy estate and it's necessary and beneficial to the fair and efficient resolution of the bankruptcy proceedings. But I submit that it is not in the best interest of the estate for the creditors committee led by the entity that really did cause the bankruptcy, not my client, it's the co-chair of the Committee that caused this bankruptcy. And they're completely committed -- they're completely conflicted. And yet, this is the entity that is going to lead the litigation against my client.

This is not an entity that's acting in the best interest of the estate. This is not an entity that is going to promote a fair and efficient resolution of bankruptcy proceedings. This is an entity that from the beginning has worked only for itself and has acted in its own best interests rather than in the best interest of the estate.

There is no showing by the Committee that having the Committee directed by Cole Kepro with its heretofore undisclosed conflicts, pursue the litigation rather than a neutral third party, like a liquidating trustee or with a

neutral oversight committee, that would be necessary and beneficial. In terms of efficiency, clearly, it would be more expensive for the Committee to litigate the claims. And here I reference my administrative claim arguments and the arguments about the numbers.

And I do have to say that in this context, I disagree with the debtor because the last month of the case where after the company's been shut down, all the debtor's been doing has been collecting money and all the debtor's FA has been doing is collecting money. And the Committee has been working on litigation and the whole thing is still a million dollars a month. So there's no reason to believe that turning from what everybody's been doing prior to now, to what they're going to be doing, it means that it's going to cost any less than a million dollars a month. And so I don't think that is necessarily efficient.

With respect to whether the claims are colorable, Your Honor, I note that with the -- there -- the two issues, it falls under is the business judgment rule. With respect to the claims that were identified in the letter, some of which are in the complaint, some of which are not, we negotiated -- we were negotiating directly with the debtor because the Committee had no standing. When the stipulation was put on the docket, we filed an opposition the Monday following the Friday where the debtor reneged on its deal with us and filed the stipulation.

The next Monday, we filed the opposition, and we responded in writing to the Committee the first thing the next morning. So within 48 hours of the stipulation being on the record, we gave the Committee a fulsome response to their letter.

Less than 48 hours ago, we received the 50-page complaint, which we frankly have not had a chance to completely digest. But I will tell you that the Committee's brief is not correct and does not cite Nevada law correctly. They claim we haven't cited it correctly, but they're wrong. The Chur case cited by our brief adopts the definition of intentional conduct in NRS 78.138(7) set forth in In re Zagg Inc. Shareholder Derivative Action, 826 F.3d 1222 (10th Cir. 2016), which says a knowing violation or intentional misconduct as exceptions to protection of corporate directors under Nevada's exculpatory statute requires conduct that the knowledge was wrongful. "The purpose of the exculpatory statute is to limit the liability of corporate directors." "Under the narrower interpretations of intentional and knowing that do not require knowledge of wrongfulness, a director would not be protected so long as the director knew what his or her actions were."

That's what the Committee is saying. He acted intentionally, but that state of mind would be present for virtually any conduct that could lead to the director's liability to the corporation or its stockholders or creditors. The exculpatory statute would be an empty gesture. To give the

statute a realistic function, it must protect more than just directors who did not know what their actions were. It should protect directors who knew what they did, but not that it was wrong. Specifically, it requires pleading with particularity of the facts and circumstances detailing the knowledge of wrongfulness.

Further, in Nevada as Wynn Resorts v. The Eighth Judicial District Court, the Nevada Supreme Court held that the business judgment rule goes beyond shielding directors from personal liability and decision making. It also ensures that courts defer to the business judgment of corporate executives and prevents courts from substituting their own notions of what is or is not sound business judgment.

In that particular case, which this Court might remember, that court found that the board's reliance on counsel was enough to establish good faith to uphold their regional business judgment without inquiring into the substance of the counsel's advice. The very fact that they were relying on counsel's advice was enough to uphold the business judgment rule. Because of these legal requirements, because Nevada requires that the Committee state with particularity that Mr. McAlary knew that what he was doing was wrong, and that they plead that as if they were pleading fraud. None of that has been pled.

With respect to the distributions made in 2021, Your

Honor, our papers go through that issue of solvency. The debtor in 2020 earned a net income of over $14 million, which was exponentially greater than its profit in 2019 of just over 2 million. The management team, the whole management team, not just Mr. McAlary, expected continued growth in 2022. The distributions that were made to Mr. McAlary about which the Committee complains, both vigorously and demeaningly, were made and were authorized by the CFO as safe harbor tax payments, believing that the company was going to make the same amount of money in 2021.

But why didn't it? Because of Cole Kepro, because the machines didn't work. After that, it was because of Bitaccess. After that, it was because the software got hacked. So there was no reason to expect that they wouldn't make the same amount of money in 2021 while those distributions were being made.

This is borne out by the 2021 audit, Your Honor. The 2021 audit was delivered in April of 2022. That audit did not have a going concern note. The auditors did not have any concerns as to the going concern of the company in April 2022 as it relates to 2021. So because during 2020 and 2021, Genesis had committed to loan the company $100 million and was loaning the company 20 -- $100 million.

Further, in April of 2022, Enigma loaned $8 million to the company and Genesis loaned another $7 million to the

company. But in any case, even assuming the claims are tolerable, the Committee cannot overcome the two-part test and has not made any showing that it's in the best interest of the bankruptcy estate for this conflicted committee and its expensive professionals to pursue this litigation rather than having a liquidation trustee, rather than waiting for the debtor to confirm and have its plan go effective or a Chapter 7 trustee. And B, the Committee has made no showing that it's necessary and beneficial to the fair and efficient resolution of the bankruptcy proceedings for the Committee and its professionals to pursue this litigation. Thank you, Your Honor.

THE COURT: Okay. Thank you.

Mr. Gayda, the Court has a few minutes left to give you. Before I let you respond, wasn't there an amended appointment of the Committee of Creditors that was entered on August 10th? Is that correct?

MR. GAYDA: Yes, Your Honor. Bob Gayda for the Official Committee of Unsecured Creditors. That is correct.

THE COURT: Okay. And there are six members of the Committee and Cole Kepro is only one of the six. Is that right?

MR. GAYDA: Yes, Your Honor. That's absolutely correct.

THE COURT: Okay. And there -- I didn't see anything

on this document indicating that Cole Kepro is the chair of the Committee or anything of that nature. Did I overlook something?

MR. GAYDA: Your Honor, I don't believe that's specified anywhere. Pursuant to the bylaws of the Committee, the Committee did elect co-chairs.

THE COURT: Okay.

MR. GAYDA: Cole Kepro is one of the co-chair -- co-chairs along with OpConnect.

THE COURT: Okay. All right. And then with respect to the various responses by Ms. Cica, particularly with respect -- I think you attached the proposed complaint as an exhibit to your response to the objection. But that complaint contains, I believe, a cause of action or a count including equitable subordination under 510(c). Isn't that right?

MR. GAYDA: That is correct, Your Honor.

THE COURT: Okay. So that would be one of the bases for seeking relief against Mr. McAlary. Is that right?

MR. GAYDA: One of many, Your Honor.

THE COURT: Okay. Then I take it that there would be attempt, and again, I'm not sure whether the Ninth Circuit still follows, or they used to follow at least, the Fifth Circuit's decision dealing with 510(c) complaints, and I think that was called Missionary Baptist Foundation. That was decided back in 1983, but it looks to whether or not there's

grounds, based on inequitable conduct, to subordinate the claim of a party. And I take it that's the theory that you would pursue if the Committee is allowed to do so. Is that right?

MR. GAYDA: That -- that's right, Your Honor.

THE COURT: Okay.

MR. GAYDA: With respect to Mr. McAlary's affirmative claim against the estate, we believe we have two grounds to disallow that claim. One would be recharacterization of that claim --

THE COURT: Okay.

MR. GAYDA: -- as equity rather than debt and the second would be equitable subordination.

THE COURT: All right. And then your position is that these are colorable claims. Then, rather than get in into the weeds whether or not the claim should be dismissed for failure to stay the claim, it's your position that at the very least you meet the threshold of allowing the creditor committee to actually pursue it through derivative standing. Is that right?

MR. GAYDA: That's right, Your Honor. You know, we go to great lengths to set out, in good detail, the claims. The facts that support those claims, we lay it out in the response to a certain extent, and to a full extent in the proposed complaint attached to that response. The idea being that it demonstrates to the Court those claims are colorable.

They have merit and, you know, irrespective of Ms. Cica's, you know, testifying in her narrative that she's painted for the Court on the record today, those would subject -- would survive a motion to dismiss and the Committee could proceed with those claims.

THE COURT: Okay. All right. Anything else that you want to present in your response?

MR. GAYDA: Your Honor, I do. Your Honor alluded to it and I have to respond on the record.

THE COURT: Okay.

MR. GAYDA: Because it's just a very disconcerting assertion.

THE COURT: All right.

MR. GAYDA: That that any of the committee members have acted in any manner that's inappropriate in this case. There is absolutely no evidence presented by Mr. McAlary. There's not a shred that anybody acted inappropriately. It's because none exists.

All the committee members, all of the current six committee members, those members were chosen by the United States Trustee. They're aware of their fiduciary duties and all of them have acted in the utmost good faith throughout this case. And, you know, Your Honor, I just have to make that point.

With respect to, and I understand the Court has

limited time, with respect to the claims, I think the Committee's willing to stand on its papers. I won't go into detail. I would refute some of the things that Ms. Cica said on the record that Mr. McAlary has challenged, but I think the papers speak for themselves. I think the claims speak for themselves and they're colorable.

I think that allowing the Committee to receive these claims today, there is no further cost that needs to be incurred. The Committee, if Your Honor would grant us standing, we would clean up the complaint and we would put it on file and the litigation could commence. I think that is beneficial to the estate. I think it's going to potentially monetize estate litigation assets and I think that those claims are legitimate. I think they have merit. They're based on months-long investigation into this case, and I think those claims should be allowed to go forward, Your Honor.

THE COURT: Okay. Anything else?

MR. GAYDA: That's it. That's it, Your Honor.

THE COURT: Okay.

MR. GAYDA: Thank you.

THE COURT: And correct me if I'm wrong, Mr. Gayda, the status hearing with respect to the other standing motion is set for August 29th. Is that right?

MR. GAYDA: That is the motion related to the Enigma lien challenges. Yes, Your Honor. That's correct.

THE COURT: Okay. All right. All right. Thank you, Counsel. The Court has heard the related arguments in connection with plan confirmation and with respect to the derivative claim objection as well. There is the status hearing on the other matter that's already set for August 29th, as well as the matters that were continued from today's calendar.

The Court will provisionally continue these two hearings to August 29th. Between now and August 29th, however, the Court intends to issue brief rulings with respect to both plan confirmation and derivative standing. The Court will, in its order, will indicate whether or not further proceedings are necessary beyond August 29th. And at that, the -- both matters are taken under submission, that being the question of confirmation of the proposed plan as well as the objection to derivative standing.

Ms. Axelrod, the Court has already indicated that it will grant the final approval of the disclosure statement. You, at your option, you can prepare a separate order approving the disclosure statement or you can await the outcome of the Court's decision with respect to plan confirmation and wrap it up either in the same or a similar order as you have previously filed. Which do you prefer?

MS. AXELROD: Your Honor, in order to save costs, I prefer to wait until the Court rules on plan confirmation so we

can do one notice of entry.

THE COURT: Okay. All right. That being said, these two matters are continued provisionally to August 29th.

Cathy, what time is that?

THE CLERK: That's at 9:30 a.m., Your Honor.

THE COURT: At 9:30 a.m.. It's the intention of the Court to have a -- an order issued on both matters prior to that time with respect to whether the Court will approve confirmation or whether it will grant derivative standing.

That being said, Ms. Axelrod, anything else that is scheduled to happen between now and August 29th?

MS. AXELROD: Brett Axelrod. I'm not anticipating anything else, Your Honor.

THE COURT: Okay. Thank you. All right. The Court concludes the hearing on these matters and the matter -- the matters are under submission.

The Court will now be in recess, Cathy, until what time?

THE CLERK: 1:30.

(Proceedings concluded at 12:04 p.m.)

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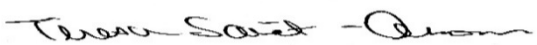
C E R T I F I C A T I O N

I, Teresa Saint-Amour, do hereby certify that the foregoing is a correct transcript from the electronic sound recording provided for transcription and prepared to the best of my professional skills and ability.



TERESA SAINT-AMOUR, AAERT NO. 2020 Dated: August 20, 2023

ACCESS TRANSCRIPTS, LLC